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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

LOCAL LODGE NO. 1424, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, AND BRYAN MANUFACTURING COMPANY, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLATO E. PAPPS
LOUIS P. POULTON
1300 Connecticut Avenue, N. W.
Washington 6, D. C.

BERNARD DUNAU
912 Dupont Circle Building, N. W.
Washington 6, D. C.

Attorneys for Petitioners Local Lodge No. 1424, International Association of Machinists, AFL-CIO, and International Association of Machinists, AFL-CIO

FRANK L. GALLUCCI
Manufacturers National Bank Bldg.
Highland Park 3, Michigan

Attorney for Petitioner Bryan Manufacturing Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Local Lodge No. 1424, International Association of Machinists, AFL-CIO, International Association of Machinists, AFL-CIO, and Bryan Manufacturing Company pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 27, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals, Judge Fahy dissenting, is not yet reported (*infra*, pp. 1a-13a). The decision and order of the Board, Chairman Leedom and Member Murdock dissenting, are reported at 119 NLRB 502 (R. 428-461, 325-427).

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1959 (*infra*, p. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the six-month period of limitations of Section 10(b) of the National Labor Relations Act bars the issuance of a complaint to invalidate a collective bargaining agreement and a successor collective bargaining agreement, both lawful on their face and containing a conventional union shop provision, where the sole foundation for the complaint is an alleged unfair labor practice which occurred at the time of the execution of the original agreement more than six months before the filing and service of the charge.

2. Whether, based exclusively on a finding that the original union shop agreement was executed at a time when the contracting union did not have a majority, the National Labor Relations Board may require the employer and the union to reimburse the employees for the union dues and initiation fees remitted by the employer to the union pursuant to the individual check-off authorization of each employee, the period of the refund to run for the term of the original and all succeeding union shop agreements beginning six months preceding the filing of the charge.

STATUTE INVOLVED

Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . ."

Section 10(c) of the National Labor Relations Act, as amended, provides in pertinent part that: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."

STATEMENT

I. The Subsidiary Findings of Fact

On August 10, 1954, the International Association of Machinists and the Bryan Manufacturing Company reached accord on the basic terms of a two-year collective bargaining agreement covering the employees of the Company's plant at Reading, Michigan (R. 348-352, 358-359). The Company extended exclusive recognition to the IAM as the bargaining representative of the employees at the Reading plant (R. 350, 283-284):

> The Company recognizes the Union as the sole and exclusive bargaining agency for all employees within the bargaining unit consisting of the fol-

lowing: all present and future employees of the company, excepting foremen, working foremen, office or clerical employees, professional employees, guards and all supervisors as defined in the Act;

Among the terms of the agreement was a conventional union shop provision (R. 351):

> As a condition of employment, all employees covered by this agreement shall, forty-five (45) days after the date of execution of this agreement; or in the case of new employees forty-five (45) days after the date of hiring, become members of the Union, and remain members in good standing in the Union during the term of this agreement.

The agreement also provided for the check-off of union dues and initiation fees upon the individual authorization of each employee (R. 284):

> Upon receipt of a signed authorization of the employee involved, the Company shall deduct from the employee's pay check the initiation fee and dues payable by him to the Union during the period provided for in said authorization.

About a year later, on August 30, 1955, a second agreement for a three-year term was entered into between the Company and Local Lodge No. 1424, International Association of Machinists (R. 343, 302-323), the Local Lodge having been founded prior to January 1955 (R. 369, n. 45). The unit of employees covered by the second agreement included, in addition to the production and maintenance employees at the Reading plant, the production and maintenance employees at a second plant at Hillsdale, Michigan, some twelve miles away (R. 338, 343-344, 393-394). The acquisition of the second plant at Hillsdale was necessitated by the Company's outgrowth of its facilities at the

Reading plant; the Hillsdale plant was to be manned by the transfer of employees from the Reading plant (R. 393-394).

The second agreement drastically revised the seniority provisions (R. 393). It also altered the job classification structure and provided for an increase in wage rates (R. 393). Numerous additional changes were made of the type which a year's experience might well have indicated were desirable (R. 392-393). The union shop and check-off provisions of the two agreements remained the same (R. 392).

On August 10, 1954, the effective date of the first agreement, there were 148 employees within the unit (R. 382, 365, n. 36). On August 30, 1955, the date the second agreement was made, there were about 350 employees in the unit (R. 394). On November 21, 1955, almost three months later, there were about 480 employees within the unit (R. 394, n. 69). Of the 480 employees in the unit on November 21, 1955, except for 30 to 40 "probationary" employees (those employed 60 days or less), all had authorized the Company to check-off their dues (R. 394, n. 69). Similarly, the 350 employees in the unit on August 30, 1955, had authorized dues check-offs (R. 394). No employee who had been with the Company 45 days or more had ever refused to have his dues checked off (R. 394, n. 69).

The unfair labor practice charges in this case were filed and served more than six months after the Company had recognized and contracted with the IAM on August 10, 1954. On June 9, 1955, Maryalice Mead, an individual, filed a charge against the Company (R. 263-264), served the next day (R. 327, n. 2), and on August 5, 1955, she filed a supplemental charge against

the Company (R. 265-266), served on August 8, 1955 (R. 327, n. 2). The June 9 charge was filed and served ten months after the Company had recognized and contracted with the IAM on August 10, 1954. The same individual filed a charge against the IAM and Local Lodge No. 1424 on August 5, 1955 (R. 260-262), which was served on August 8, 1955 (R. 327, n. 2). The August 5 charge was filed and served almost twelve months after the Company had recognized and contracted with the IAM on August 10, 1954.

The charge against the unions, as the supplemental charge against the Company, alleged *inter alia* that "at the time of the execution of this collective bargaining agreement" on August 10, 1954, the unions "were not unassisted and/or majority representatives of the employees in the unit . . ." (R. 261, 266). Based on these charges, separate complaints were issued against the Company and the unions (R. 267-277). As amended, the complaints alleged *inter alia* that at the time of the entry into the first agreement on August 10, 1954, and into the second agreement on August 30, 1955, the "Union did not in fact represent a majority of the employees within the bargaining unit . . ." (R. 268-269, 274, 282-283).

II. The Ultimate Findings as to the Merits of the Unfair Labor Practice Alleged

On the merits, the Board found that the critical question pertains "to the IAM's lack of majority with respect to the 1954 agreement" (R. 381). It observed that "the crucial date with respect to majority is August 10, 1954, because on that date the Respondent Company, having recognized the IAM and bargained with it, agreed to the provisions of the basic contract which gave the IAM its union-security and check-off

benefits" (R. 382). It concluded that, of the 148 employees in the unit, "the IAM had not been designated by a majority of the employees in the appropriate unit at the Reading plant at any time prior to August 16, 1954" (R. 389).

The Board observed that "the ultimate findings as to the 1955 agreement hinge upon findings as to majority and assistance with respect to the 1954 agreement" (R. 387, n. 63). For, in its view, "such adherence as the IAM secured, on and after that date [August 16, 1954], cannot contribute to establishing a valid and unassisted majority" (R. 389). Based on the finding that the Company had assisted the IAM by recognizing and contracting with it on August 10, 1954, when it did not have a majority (R. 389-390, 413 and n. 98), the Board concluded "that the 1955 agreement is subject to the same taint and infirmity as the 1954 agreement" (R. 395).

Accordingly, based on its foundation "finding that at the time the . . . [Company and the IAM] executed the August 1954 agreement the . . . Unions did not represent a majority of the employees covered by the agreement", the Board stated (R. 437):

> It follows therefore, and we find, . . . that . . . the Company violated Section 8(a)(1), (2), and (3) and the . . . Unions 8(b)(1)(A) and (2) by maintaining in effect the 1954 agreement and by executing and maintaining in effect the 1955 agreement, both of which contained unlawful union security clauses.

The union security clauses were found to be unlawful, not because "illegal *per se*" (R. 351), but solely because of the IAM's lack of majority when the 1954 agreement was executed (R. 412-413).

III. The Disposition of the Question Whether the Six-Month Period of Limitations Contained in Section 10(b) of the Act Barred the Issuance of the Complaints

Since the critical event—the Company's act of recognizing and contracting with the IAM on August 10, 1954, at a time when the IAM did not have a majority—occurred more than six months before the filing and service of the unfair labor practice charges, the question whether issuance of the complaints was barred by the limitations provision of Section 10(b) of the Act was sharply raised. Section 10(b) provides that:

> . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

A divided Board concluded, by a three to two vote, that issuance of the complaints was not barred by the running of the six-month period of limitations.

In the majority's view, Section 10(b) merely precluded the Board from finding the execution of the 1954 agreement to be an unfair labor practice; it did not bar the Board from finding the maintenance in effect of the 1954 agreement for the period beginning six months preceding the filing of the charge, and the execution and maintenance in effect of the 1955 agreement, to be an unfair labor practice (R. 430-435).

The majority supported its conclusion in reliance upon two concepts: (1) "Section 10(b) is a statute of limitations and not . . . a rule of evidence" (R. 432-433); Section 10(b), therefore, "does not bar the receipt of evidence, antedating the critical period, which may be relevant in determining whether conduct within the 6 months period was unlawful" (R. 433); accord-

ingly, "The legality of the Respondents' conduct in maintaining the 1954 and 1955 union security contracts, and in signing the 1955 agreement, must be considered in the light of the evidence surrounding the execution of the 1954 agreement" (R. 435); so considered, it establishes that it was an unfair labor practice to maintain the 1954 and the 1955 agreements, and to execute the 1955 agreement, because the Company recognized and contracted with the IAM on August 10, 1954 when it did not have a majority (R. 436-437). (2) Section 10(b) does not bar issuance of a complaint based on maintenance in effect of an agreement *invalid on its face* but executed more than six months before the filing of the charge; there is "no difference in illegality between a contract unlawful on its face, that is, one prescribing a form of union security prohibited by the Statute, and a contract invalid because certain requisites to the making of a valid contract have not been complied with. In both instances the invalidity begins at a point in time and continues so long as the unlawful contract remains in effect"; accordingly, it does not matter that the illegality of an agreement *valid* on its face can be established solely in reliance on an unfair labor practice attending its execution which antedated the charge by more than six months (R. 434-435).

Chairman Leedom and Member Murdock dissented (R. 449-457). The dissenters were of the view—and the majority agreed as to this—that maintenance in effect of the 1954 agreement, and execution and maintenance in effect of the 1955 agreement, could be found to be unfair labor practices only upon the basis of the IAM's recognition on August 10, 1954; that the six-month period of limitations had clearly run as to that alleged unfair labor practice; and that, since the events

within the six-month period could be found to be unfair labor practices only on the basis of the barred event. Section 10(b) had eliminated the sole foundation upon which any determination of an unfair labor practice could be predicated (*ibid.*).

As to the majority's observation that Section 10(b) does not bar receipt in evidence of events antedating the six-month period, the dissenters pointed out that "evidence as to such events is admissible for background purposes" only, and that it "is well established that in making unfair labor practice findings the Board cannot rely solely on events which occurred more than 6 month. before the filing of the charges . . ." (R. 452). As to the majority's assimilation of an agreement invalid on its face with one valid on its face, the dissenters pointed out that the considerations relevant to each are different (R. 451-452):

> . . . in the second type of situation involved herein, where the reason for the invalidity assertedly lies in a failure in executing the agreement to comply with some or all of the requisites for making a valid union-security agreement, the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis. Accordingly, although an agreement invalid in its inception may continue to be invalid throughout its life, the fact of its invalidity and the consequent existence of unfair labor practices cannot be established merely by proof that the agreement was being maintained at some point in time subsequent to its execution, but can only be established by proof of the facts surrounding its execution in the past, which

created the initial invalidity. When as here, therefore, the charges are filed more than 6 months after the execution of the agreement, proof of its invalidity and the consequent unfair labor practices can only be established by reliance on evidence of events which occurred more than 6 months before the filing of the charge. This Congress expressly precluded by Section 10(b).

A divided Court of Appeals, Judge Fahy dissenting, affirmed the view of the Board majority, stating that mindful of its "limited scope of review" it was "constrained to uphold the Board's conclusion" (*infra*, p. 5a) as "rational" (*infra*, p. 5a) and "not unreasonable" (*infra*, p. 9a). Judge Fahy in dissent stated in part that (*infra*, p. 13a):

> One of the principal purposes of a statute of limitations is to bring repose. As stated in *NLRB v. Pennwoven, Inc.*, 194 F. 2d 521, 524 (3d Cir. 1952), the rationale underlying such a statute is to prevent "people . . . being brought to book upon stale charges." Consistently with this, the period of limitations in the Taft-Hartley Act must have been deliberately adopted by Congress to aid in stabilizing labor relations by precluding adversary proceedings based on events which had laid dormant for six months. Under the decision of the court, however, there is no limit whatsoever to the time that might pass, with countless changes in the details of relations and obligations, without a complaint being barred, although proof of the true basis of illegality of the conduct complained of lies in the years that are gone. This seems to me inconsistent with the Congressional policy expressed in §10(b).

IV. The Board's Order

The Board's order, enforced by the Court of Appeals (*infra*, p. 12a), *inter alia* requires the Company to cease giving effect to its agreements with the unions, severs

the bargaining relationship between them, and bars a resumption of recognition unless and until the unions have been certified by the Board (R. 437-441). In addition, the order requires that the Company and the unions "shall jointly and severally reimburse the employees and the former employees of the Respondent Company whose initiation fees and/or dues in the Respondent Unions have been checked off pursuant to any agreement between the Respondents for the amounts deducted from the employees' earnings, beginning with the applicable 6-month period" (R. 442).

REASONS FOR GRANTING THE WRIT

1.

A divided Court of Appeals, affirming a divided Board, has decided an important question of law pertaining to the limitation of actions on union security agreements, significant in its impact on established bargaining relationships, erroneously and in conflict with the decision of the Court of Appeals for the Fifth Circuit in *American Federation of Grain Millers* v. *National Labor Relations Board*, 197 F. 2d 451.

1. In a study of 1,653 collective bargaining agreements, covering 5,549,000 workers, the Bureau of Labor Statistics found that union security was provided for in 75 per cent of the agreements, either by a union shop provision (63 per cent) or by a maintenance of membership clause (12 per cent).[1] The decision below holds that the statute of limitations does not run upon any union security agreement while it or

[1] Hammond and Nix, *Union-Status Provisions in Collective Agreements, 1952*, 76 Monthly Lab. Rev. 383, 384-385 (1953).

any succeeding one is in effect, although the agreements are valid on their face and the claim of illegality relates solely to the execution of the original agreement. As Judge Fahy stated in dissent, "Under the decision of the court, . . . there is no limit whatsoever to the time that might pass, with countless changes in the details of relations and obligations, without a complaint being barred, although proof of the true basis of illegality of the conduct complained of lies in the years that are gone" (*infra*, p. 13a). Since most collective bargaining agreements contain union security clauses, the result of the decision below is to strip the vast majority of agreements, and the bargaining relationships upon which they are founded, of the protection of repose which a statute of limitations is designed to confer.

The appropriateness of review of this important question is enhanced by this Court's grant on December 15, 1958, of the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *Fant Milling Co.*, No. 482, October Term 1958. The question in the latter case is whether the limitations provision of Section 10(b) prohibits the Board from including in a complaint alleged violations which occur *subsequent* to the filing of the charge without the filing of a further charge pertaining to these subsequent violations. In contending that it does not, the Board in its petition to this Court stated that the "1947 amendment restricted the Board's power to probe events occurring more than six months *prior* to the charge . . ." (p. 11). In the instant case the Board asserts just this power to probe events antedating the charge by more than six months. The two cases together thus run the full gamut from events which occur more

than six months before the filing of the charge to events which occur after its filing. Together the two cases afford a full opportunity to settle the meaning of Section 10(b) and sound decision in each would be promoted by their joint consideration.

2. The decision below conflicts with the decision of the Court of Appeals for the Fifth Circuit in *American Federation of Grain Millers* v. *National Labor Relations Board*, 197 F. 2d 451. In the latter case an employer denied the application for reinstatement made by strikers who had been permanently replaced during the strike. The denial was proper if the strike was economic in nature; it was improper if the strike was caused or prolonged by unfair labor practices.[2] Whether it was an economic or an unfair labor practice strike depended upon whether it was caused by an unlawful refusal to bargain. But the alleged refusal to bargain preceding the strike occurred more than six months before the filing and service of the charge. The complaint alleging the discriminatory refusal to reinstate the strikers was accordingly dismissed because it was based upon an unfair labor practice which antedated the charge by more than six months. The Court of Appeals for the Fifth Circuit explained that "what the union is in effect seeking to do is to use the happenings after June 18th [the date six months preceding the filing of the charge], as mere connective incidents wherewith to bridge the fatal gap in time between the happenings really relied on as unfair labor practices and the six months' bar, hoping thereby to cross over the six months' barrier

[2] *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898, 906 (C.A. 6), affirmed in part and reversed in part on other grounds, 356 U.S. 342.

which would otherwise preclude the charge." 197 F. 2d at 454.

The operative facts in *Grain Millers* and the instant case are identical but the results conflict. In *Grain Millers*, the act antedating the six-month period is the employer's refusal to bargain with the union; in this case, the act is the employer's recognizing and contracting with the union when it does not have a majority. Both acts are unmistakable unfair labor practices; both acts are indispensable predicates for finding a violation within the six-month period. But in *Grain Millers*, because "the happenings really relied on as unfair labor practices" antedated the filing of the charge by more than six months, Section 10(b) was held to bar their importation into the allowable six-month period. Here, on the other hand, although "the happenings really relied on as unfair labor practices" also antedated the filing of the charge by more than six months, their importation was nevertheless permitted.

The decision below conflicts with the principle enunciated in numerous decisions, administrative and judicial, that unobjectionable conduct within the allowable six-month period cannot be converted into an unfair labor practice in reliance upon a barred violation which occurred before then.[3] The court be-

[3] Thus Section 10(b) has been held to operate as a bar in the following situations: the alleged domination of a labor organization by an employer within the period based exclusively upon evidence of formation, support, or domination antedating the period (*Universal Oil Products Co.*, 108 NLRB 68; *Armco Drainage & Metal Products, Inc.*, 106 NLRB 725, 730-731, enforced as modified, 220 F. 2d 573 (C.A. 6), cert. denied, 350 U.S. 838; *Tennessee Knitting Mills*, 88 NLRB 1103, 1104-1105); the alleged discriminatory refusal to grant a wage increase to employees within the

low states that it "uphold[s] the Board's order under the authority of *NLRB* v. *Gaynor News Co.*, *supra*, 197 F. 2d 719 (2d Cir. 1952), . . . and *Katz* v. *NLRB*, *supra*, 196 F. 2d 411 (9th Cir. 1952)" (*infra*, p. 11a). But, as the court itself recognized (*infra*, p. 6a), the invalidity of the agreements in the cited cases was established by a fact in existence within the six-month period; there was no need to look to any event antedating the six-month period to establish the illegal elements.[4] Here, on the contrary, it is an unfair labor practice antedating the period which is the exclusive foundation for finding a violation with-

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period based exclusively upon evidence of discrimination antedating the period (*News Printing Co., Inc.*, 116 NLRB 210); the alleged discriminatory layoff of an employee within the period based exclusively upon evidence of a discriminatory reduction in his seniority antedating the period (*Bowen Products, Inc.*, 113 NLRB 731); and the alleged discriminatory denial of an application for full reinstatement within the period based exclusively upon the employee's discriminatory discharge antedating the period (*N.L.R.B.* v. *Pennwoven, Inc.*, 194 F. 2d 251 (C.A. 3); *N.L.R.B.* v. *Childs Co.*, 195 F. 2d 617 (C.A. 2)).

[4] The cited cases were decided under that part of the proviso to Section 8(a)(3)—since repealed (Public Law 189, 82d Cong., 1st Sess.)—which had required, in order to validate any union security agreement, that "following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement." An agreement valid on its face, but unsupported by the requisite certificate of the contracting union, was illegal, and a complaint could properly issue based upon the maintenance of the agreement in effect although executed more than six months before the filing and service of the charge. However, the violation was established by proof of the existence of the agreement, plus proof of the lack of the certificate, both of which were facts in being within the allowable six-month period; there was no need to look to events antedating the period in order to establish the violation.

in the period. The court below can hardly invoke the "authority" of cases in which "the present question was not involved. . . ." *Wright* v. *United States*, 302 U.S. 583, 593.

3. It is singularly revealing that at no stage does the court below address itself to the words of Section 10(b), its purpose, or its legislative history.

(a) *Words:* The whole foundation of the complaint rests upon the unfair labor practice of recognizing and contracting with the IAM on August 10, 1954, when it did not have a majority. The complaint is "based upon" that unfair labor practice. It is an unfair labor practice "occurring more than six months" before the filing and service of the charge. And Section 10(b) could not state more plainly than it does that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge. . . ."

(b) *Purpose:* The six-month limitations period was newly adopted in 1947. Concerned that "people were being brought to book upon stale charges," Congress enacted the "rather brief limitation period . . . to shorten up the time in which respondents could be called to answer charges of unfair labor practice." *N.L.R.B.* v. *Pennwoven, Inc.*, 194 F. 2d 521, 524 (C.A. 3). Enactment of limitations had been severely criticized and sharply opposed, fear having been expressed that it would permit unfair labor practices to go unredressed, particularly in that six months was "the shortest statute of limitations known to the law. . . ."[5] But the view

[5] S. Min. Rep. No. 105, 80th Cong., 1st Sess., 5, 37; H. Min. Rep. No. 245, 80th Cong., 1st Sess., 90; 93 Cong. Rec. 3323, 4030; respectively in 1 Leg. Hist. 467, 499, 381, 2 Leg. Hist. 998, 1037.

prevailed that "There must be a limitation as to time," and that "within 6 months the complainant against an unfair labor practice should be able to bring it to the attention of the National Labor Relations Board."[8]

Whether the redress of unfair labor practices should be barred by limitations, and the shortness of the period within which the bar should operate, are questions exclusively within the competence of Congress. Congress exercised its judgment by enacting a six-month statute of limitations. In this case the critical unfair labor practice was the inception of the relationship between the IAM and the Company on August 10, 1954. But no charge was filed until ten months later. It could have been filed as easily within the prescribed six months of the event. Having waited four months too long, the action was forever barred. This is what it means to have a statute of limitations.

If, as here, despite the total dependence of the complaint on the alleged unfair labor practice which occurred on August 10, 1954, the Board may nevertheless proceed on the basis of a charge filed ten months later, why not twenty months, thirty months, or forty months later? And if, as here, the Board can undo the bargaining relationship after the second agreement, simply because of a defect in the original inception of the relationship, why not after the third, fourth, or fifth agreement? To prevent this Congress drew the line at six months. Either that line is to be respected or there is no line.

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[8] 93 Cong. Rec. 4283 in 2 Leg. Hist. 1149; see also, H. Rep. No. 245, 80th Cong., 1st Sess., 40; S. Rep. No. 105, 80th Cong., 1st Sess., 26; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 53; respectively in 1 Leg. Hist. 331, 432, 557.

To disregard the line is at war with the principle of repose—the stability it is designed to foster if a charge is not timely filed and served within the allowable six month period. If the period of limitations has not run in this case, it never can. A bargaining relationship, defective only because of a misstep in its origin, would be perpetually vulnerable. No limitation would be applicable to it. There "never could be an end to the controversy because in the Board's view the wrong was a continuing tort." L. Hand, J., concurring in *National Labor Relations Board* v. *Childs Co.*, 195 F. 2d 617, 621 (C.A. 2). "To adopt the Board's theory of the continuing violation is not in accordance with what we believe the intent of the Congress was in establishing the six-months limitation period." *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F. 2d 521, 526 (C.A. 3). The "case will never be closed until it is finally litigated" (*id.* at 525); yet to fail to quiet the controversy "would not conduce to that industrial peace which it is the overall purpose of the Act to secure." L. Hand, J., *supra*, at 621-622.

(c) *Legislative history:* The legislative history shows that a prime object of the statute of limitations was to safeguard a union security agreement from invalidation because of alleged illegality in its inception unless a charge had been filed within the prescribed time measured from the date of the execution of the agreement. The Senate Report observed in its comment upon Section 10(b) that (S. Rep. No. 105, 80th Cong., 1st Sess., 26 in 1 Leg. Hist. 432):

> The principal substantive change in this section is a provision for a 6-month period of limitations upon the filing of charges. The Board itself by adopting a doctrine of laches has to some extent discouraged dilatory filing of charges, *and a rider*

> *to the current appropriations bill (which if this amendment was adopted would no longer be necessary) contains a 3-month period of limitations with respect to certain kinds of unfair labor practices.* [Emphasis supplied.]

The rider to the then current appropriations bill to which the Senate Report referred provided in relevant part that:[7]

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, or a renewal thereof, between management and labor *which has been in existence for three months or longer without complaint being filed* by an employee or employees of such plant. . . . [Emphasis supplied.]

Under this rider, the three-month limitations period it prescribed began to run from the time the agreement came into "existence," and if, "without complaint being filed by an employee or employees," the agreement "has been in existence for three months or longer," prosecution of a "complaint case arising over . . . [that] agreement" was barred. This rider was not only part of the then current appropriations bill but it had appeared in substantially the same form in each of the preceding NLRB Appropriation Acts beginning with that for the fiscal

[7] The Senate Report is dated April 17, 1947. The appropriations bill pertaining to the NLRB then extant was H.R. 2700, 80th Cong., 1st Sess., which had been reported by the House Appropriations Committee on March 21, 1947, 28 days before the Senate Report issued. The Senate referred this appropriations bill to its Appropriations Committee on March 26, 1947, 22 days before the Senate Report issued.

year ending June 30, 1944.[*] The NLRB Appropriation Act, 1949 (62 Stat. 404), the first to be enacted after the effective date of the 1947 Taft-Hartley amendments, no longer contained a limitations rider, and none has since been included. The elimination of the riders was of course the consequence of the adoption of the general six-month limitations period in Section 10(b); as the Senate Report stated, upon the adoption of Section 10(b) the limitations riders upon appropriations "would no longer be necessary."

It is thus clear that, even before the adoption of Section 10(b), limitations were applicable to bar the invalidation of an agreement if a charge had not been filed within three months of the execution of the agreement and the other conditions of the rider were met. The immediate impetus to the adoption of the limitations riders had been the pendency of proceedings before the Board in 1943 looking towards invalidation of the closed shop agreements covering the employees of the Kaiser shipyards on the Pacific Coast, the agreements being subject to invalidation because they had been entered into with unions which did not possess representative status. The means adopted to safeguard the agreements was to insulate from complaint any agreements "in existence for three months or longer" without a charge filed. 89 Cong. Rec. 6566-69, 6949-54, 7029-34; N.L.R.B., Eighth Annual Report, 7 (1943); N.L.R.B., Ninth Annual Report, 4 (1944). The rider was not confined to the Kaiser shipyards but was given general applicability to assure that "labor relations should be stabilized all over the country" (89 Cong.

[*] NLRB Appropriation Act, 1944, 57 Stat. 515; NLRB Appropriation Act, 1945, 58 Stat. 567; NLRB Appropriation Act, 1946, 59 Stat. 377; NLRB Appropriation Act, 1947, 60 Stat. 698.

Rec. 6568), and to this end to "adopt the principle of stabilization of union control in the plants where particular unions are now in control" (89 Cong. Rec. 7033). See also 89 Cong. Rec. 6566, 6567, 6953, 6954, 7029, 7034. The gist of the matter was succinctly put by Congressman Tarver (89 Cong. Rec. 6953):

> . . . we should enact this proviso and stop this squabbling out there on the Pacific Coast or anywhere else in the country, especially when the contract, *whether it was proper at the time of its inception or not*, has been in effect for three months without complaint. [Emphasis supplied.]

And the administrative interpretation and application of the limitations riders left no doubt that, regardless of the enforcement of the union security agreements, the agreements were nevertheless invulnerable to invalidation unless a charge had been filed within the requisite three months from their inception and the other conditions of the riders had been met. N.L.R.B., Eighth Annual Report, 6-10 (1943); N.L.R.B., Ninth Annual Report, 4-6 (1944); NLRB Interpretations Issued April 20, 1944, 12 LRRM 2232; Comptroller General Decision B-37051, October 4, 1943, 12 LRRM 2227, 2232.

Yet the decision below wipes out the applicability of limitations to union security agreements. It thereby not only renders untrue the statement in the Senate Report that upon adoption of Section 10(b) the limitations riders upon the Board's appropriations "would no longer be necessary." It also requires the conclusion that, when Congress for the first time in 1947 enacted a statute of limitations having general applicability to all unfair labor practices, it was at the same time and by that very act eliminating the al-

ready existing applicability of limitations to union security agreements. This is not possible.

4. The Board and the court below rely upon considerations which elide the issue:

(a) The Board states that Section 10(b) is a statute of limitations and not a rule of evidence (R. 432-433); that it therefore does not bar receipt in evidence of events antedating the allowable six-month period (R. 433); that consideration of that antedating evidence establishes that the Company recognized and contracted with the IAM when it did not have a majority and for that reason the union security agreement was invalid at inception (R. 434-435); and, therefore, by reason of this initial invalidity, maintenance of the original agreement and execution and maintenance of the successor agreement within the six-month period may be found to be an unfair labor practice (R. 436-437).

To reason in this fashion is to end with the conclusion that Section 10(b) is not only not a rule of evidence, it is not a statute of limitations either. The court below amended the Board's statement by adding that the receipt of evidence antedating the six-month period is "subject to the important qualification that testimony as to such barred events may be received only as background evidence and may not be given independent significance" (*infra*, pp. 6a-7a). But this was a promise to the ear broken to the hope. For the court gave the barred unfair labor practice just that "independent significance" which it stated was precluded.

The controlling event in this case is the Company's act of recognizing and contracting with the IAM on August 10, 1954 when the IAM did not have a majority.

It is this barred unfair labor practice, which occurred ten months before the first charge was filed, that is the exclusive foundation for the conclusion that offenses occurred within the allowable period. But for this barred act there is *no* evidence of a violation within the six-month period. The unfair labor practice antedating the period is thus used, not as a background evidence, but as the sole evidence upon which to predicate the violation found. The barred event was given more than "independent significance", it was given exclusive significance. But "Section 10(b) of the Act precludes the Board from giving independent and controlling weight to such evidence."[9]

(b) The Board reasons that, as Section 10(b) does not bar issuance of a complaint based on continuance in effect of an agreement *invalid on its face* but executed more than six months before the filing of the charge, the same must be true of an agreement *valid on its face* but illegal because executed when the contracting union did not have a majority (R. 434-435). The distinction between the two is obvious and decisive.

With an agreement invalid on its face, no evidence but the agreement is needed to establish the violation of maintaining an unlawful arrangement in effect. No proof of events antedating the allowable six-month period is requisite; no question arises of reliance upon a barred unfair labor practice to establish the viola-

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[9] *News Printing Co.*, 116 NLRB 210, 212; *Universal Oil Products Co.*, 108 NLRB 68, 69-70; *Armco Drainage & Metal Products, Inc.*, 106 NLRB 725, 730, enforced as modified, 220 F. 2d 573 (C.A. 6), cert. denied, 350 U.S. 838; *Local Union No. 1418, General Longshore Workers*, 102 NLRB 720, 739, enforced, 212 F. 2d 846 (C.A. 5); *Greenville Cotton Oil Co.*, 92 NLRB 1033, 1034, n. 6, affirmed, 197 F. 2d 451 (C.A. 5).

tion. In this context the concept of continuing violation is relevant only in refutation of the defense that because the arrangement was inaugurated more than six months before the charge was filed its current maintenance in effect is immune. To that argument the simple and direct answer is that the illegality, patent on the face of the agreement and requiring no proof of antecedent events, did not cease with its inception but continued to date.

Not so with an agreement valid on its face. It is not possible to say of such an agreement that on its face its maintenance in effect is a continuing violation. Only proof of illegality in its inception would furnish the predicate for a statement that it is illegal in its continuance. And it is precisely this showing that Section 10(b) operates to preclude when establishment of illegality in inception depends upon proof of an unfair labor practice antedating the filing of the charge by more than six months. That is this case.

The court below seeks to finesse the difference. It states that within the six-month period union membership and dues payment were "contractually compelled"; that these "unfair practices . . . are positive acts which are both continued and repeated"; and "where the violations are of this character, *i.e.*, continued and repeated," it is "appropriate for the Board to rely on events outside the statutory period to establish a critical element of proof of the offense" (*infra*, p. 8a). The Board espoused no such notion. And for obvious reasons. For what the court below describes as "unfair practices" and "violations" are the normal and legitimate attributes of the administration of any union security agreement. The very reason for being of a union security agreement is to require the

employee to obtain union membership by paying initiation fees and to retain union membership in good standing by paying periodic dues. This the statute permits in express terms. (Proviso to Section 8(a)(3); *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40-42). Union membership and dues payment pursuant to the terms of a union security agreement valid on its face can be said to be "unfair practices" and "violations" only by showing that one of the conditions requisite to entry into the agreement has not been met. It is this showing that Section 10(b) precludes when execution of the agreement antedates the filing of the charge by more than six months. In short, the court below would justify piercing the six-month period by calling the acts involved in the administration of a union security agreement "unfair practices" and "violations", whereas the only legal basis for characterizing the acts as "unfair practices" or "violations" arises only after the six-month period has already been breached. This is a brilliant example of lifting oneself by one's own bootstraps.

(c) The court below states that, because of the more ramified interests with which the Taft-Hartley Act deals, "in interpreting, applying and administering a statute of limitations prescribed by Congress in this context, the Board—and the courts—are not confronted by precisely the same considerations as apply to statutes of limitations affecting the private rights of two individual litigants" (*infra*, pp. 10a-11a). This is novel doctrine. This Court was unimpressed with it in *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 66. In that case, in holding that a complaint under the Walsh-Healey Act, alleging the knowing

employment of child labor was barred by limitations, this Court gave the statute of limitations a conventional construction, rejecting the countervailing argument that the conventional construction "will prejudice the power of the United States to safeguard the public interest." *Id.* at 66. Congress was also unimpressed when it enacted Section 10(b). It described the mischief at which it aimed in the traditional terms of eliminating delayed litigation "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H. Rep. No. 245, 80th Cong., 1st Sess., 40 in 1 Leg. Hist. 331. In its earlier enactment of the limitations riders upon the Board's appropriations, designed expressly to safeguard from invalidation union security agreements not the subject of a timely charge, Congress stressed "stabilization" (*supra*, pp. 21-22), the thought which is fundamental to repose. And the very shortness of the six-month period which Congress adopted demonstrates its dominating purpose to bring about speedy surcease to a controversy not made the subject of a prompt charge. When the court below states, with approval, that the "Board may have thought that the interests of self determination outweighed otherwise important considerations of burying stale disputes" (*infra*, p. 11a), it sanctions an administrative revision of the congressional judgment.

(d) The court below states that "Our scope of review is limited to determining . . . whether the Board has applied the statute in 'a just and reasoned manner.' *Gray* v. *Powell*, 314 U.S. 402, 411 (1941). Having in mind this limited scope of review, we are con-

strained to uphold the Board's conclusion" (*infra*, p. 5a).[10] To invoke this concept in this case "is heresy." Jaffe, *Judicial Review: "Substantial Evidence On The Whole Record,"* 64 Harv. L. Rev. 1233, 1258 (1951). *Gray* v. *Powell* teaches that "Once the appropriate standards of relevance have been given by the courts, the agency is the sole body competent to apply those standards to a state of facts, whether agreed to or disputed." *Id.* at 1259. That is not this case. Here it is the meaning of the statute itself which must be determined in the light of its words, purpose, and history; and since it is the meaning of a statute of limitations in particular which is in issue, the subject by its nature is especially suited for independent judicial inquiry. Agency expertness not only does not contribute to the solution of this naked question of law but positively derogates from it. For the drive of the administrative mind is to regard a statute of limitations as an annoying impediment to the accomplishment of the agency's regulatory mission. It takes a mind schooled in a broader discipline to know, as Mr. Justice Holmes has stated, that "the principle [of repose] involved is as worthy of respect as any known to the law." *Dunbar* v. *Providence and Boston R.R. Co.*, 181 Mass. 383, 385. In this context for the court below to say that it is "constrained" to uphold the Board's conclusion as "rational" (*infra*, p. 5a) and "not unreasonable" (*infra*, p. 9a) "suggests an abdication of the judicial function." Jaffe, *Judicial Review: Questions of Law*, 69 Harv. L. Rev. 239, 263 (1955).

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[10] Omitted from the quotation is the court's additional statement that review is also "limited to determining whether there is substantial evidence in the record as a whole to support the Board's findings of fact . . ." (*infra*, p. 5a). This is correct but irrelevant since petitioners did not contest the findings.

II

The Board's order, enforced by the court below (*infra*, p.), provides in part that petitioners "shall jointly and severally reimburse the employees and the former employees of the Respondent Company whose initiation fees and or dues in the Respondent Unions have been checked off pursuant to any agreement between the Respondents for the amounts deducted from the employees' earnings, beginning with the applicable 6-month period" (R. 442). The Board gave no explanation for its order other than to cite its earlier opinion in *Hibbard Dowel Co.*, 113 NLRB 28 (R. 417, n. 100, 442, n. 23). *Hibbard Dowel* gave no explanation other than to assert that the payment of dues and fees under the sanction of a union security agreement is involuntary, and that since the involuntarism is rooted in an invalid agreement reimbursement is justified. 113 NLRB at 30-31.

The premise is fundamentally false. When the 1947 amendments to the Act were adopted, the proviso to Section 8(a)(3) was amended to provide that a union security agreement could only be valid "if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement. . . ." This requirement was repealed on October 22, 1951 (Public Law 189, 82d Cong., 1st Sess.), it having proved "burdensome and unnecessary." *National Labor Relations Board* v. *Gaynor News Co.*, 197 F.2d 719, 724 (C.A. 2), affirmed, 347 U.S. 17. Its pointlessness was manifest from the results of the union-shop authorization polls conducted by the Board which overwhelmingly

demonstrated that employees voluntarily favor the adoption of union security agreements."

The polls forever put the quietus to the notion that union security agreements merely constitute a device to constrain the payment of dues and fees by an unwilling majority. These agreements operate compulsively only as to that small group known as "'free riders,' *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union . . ." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 41. Such agreements are the means by which a majority of the employees can require a negligible minority to pay their own way.

There is no reason to suppose that the sentiment was different in the present case. While the 1951 amendment repealed the requirement of a prior election to validate a union security agreement, it substituted in its stead the stipulation that a union security agreement may neither be executed nor enforced if "following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement"

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[11] Thus, for the fiscal year ending June 30, 1951, of 1,335,683 valid votes cast in such referendums, 1,164,143, or 87.2% of the employees, voted in favor of the union shop. (N.L.R.B., Sixteenth Annual Report, 306 (1951).) The same was true of the preceding years. In 1950, of 900,866 valid votes, 89.4% favored the union shop (N.L.R.B., Fifteenth Annual Report, 235 (1950)); in 1949, of 1,471,092 valid votes, 93.9% favored the union shop (N.L.R.B., Fourteenth Annual Report, 172 (1949)); in 1948, of 1,629,330 valid votes, 94.2% favored the union shop (N.L.R.B., Thirteenth Annual Report, 111 (1948)).

(Section 8(a)(3) proviso). Thus the employees have it within their power to divest an agreement of its union security provision. No deauthorization petition was ever filed in this case, although it could have been at any time (*Andor Co., Inc.*, 119 NLRB 925), the only requirement for the conduct of an election being that the petition be supported "by 30 per centum of the employees in a bargaining unit covered by an agreement" containing a union security clause (Sec. 9(e)(1)). Not even 30 percent of the employees could be mustered to support an election looking toward rescission of the union security provision of the agreements.

This record demonstrates the extremes of the Board's assumption. The Board premises the invalidity of the union security agreement upon the single circumstance that less than half of 148 employees designated the IAM to represent them on August 10, 1954. Yet there were 350 employees in the unit about a year later, more than doubling the initial complement; and there were 480 employees in the unit on November 24, 1955, more than tripling the initial complement (*supra*, p. 5). Thus most of the employees were newly added after the original execution of the 1954 agreement. When they arrived on the scene they found nothing but the conventional manifestations of a typical bargaining relationship. There is no reason to suppose that they did not willingly embrace what they found, as is true in thousands of plants throughout the United States.

The emptiness of the Board's major premise is matched by its disregard of other cogent considerations. The 1954 and 1955 agreements provided substantial benefits for the employees. The negotiation

of an agreement costs money, as does its administration. Dues and fees go towards defraying the cost. They do not repose in depositories. It may safely be assumed that much of the fees and dues collected in this case have been expended to pay for services. To require the reimbursement of dues and fees at this late date does not simply mean that the employees will have received the benefits of union representation without contributing to their cost. The moneys for reimbursement must come from somewhere, and insofar as the unions are concerned, they must come from the dues and fees paid by other employees in other plants. What reimbursement comes down to, therefore, is that the employees in this case will have the benefits they secured from union representation paid for by the employees in other plants. This does not serve to effectuate any policy of the Act. And insofar as the Company is concerned, it simply acted as a conduit for the transmission of the funds.

Furthermore, it is the fees and dues *checked-off* pursuant to the employee's individual authorization which are to be reimbursed. If, as we must infer from the Board's order, it is the check-off authorization which is critical, it is plain that that authorization is the individual voluntary act of each employee. Nothing compels the check-off authorization; it serves the employee's convenience as well as the union's. Thus in requiring reimbursement of *checked-off* fees and dues, the Board's order identifies as critical the very act which indisputably flows from the employee's individual authorization.

The Board's order is rooted in an extension and misapplication of this Court's decision in *Virginia Electric and Power Co.* v. *National Labor Relations*

Board, 319 U.S. 533. This Court decided that a reimbursement order was within the Board's power and that the exercise of the power was within the Board's discretion in the particular circumstances of that case. The ruling circumstance in *Virginia Electric*, which controlled the evaluation of every other factor, was "that the Company was responsible for the creation of the I.O.E. [the contracting union] by providing its initial impetus and direction and by contributing support during its critical formative period." 319 U.S. at 540. The company-dominated character of the contracting union is at the heart of *Virginia Electric*. The ruling factor of domination present in *Virginia Electric* is absent here. In this case the Board expressly found that the unions were *not* sponsored or dominated by the Company (R. 413-414). And there are no substituting circumstances which the Board has convincingly appraised or which exist to support the reimbursement order here.

To found a reimbursement order solely upon the invalidity of the union security provision of an agreement, and to have it run in favor of all the employees covered by the agreement, is a recent innovation of the Board. Member Peterson dissenting in *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594, 605-606. It rests exclusively on the administrative *ipse dixit* that regardless of circumstances the payment of union dues must be presumed to have been involuntary. The Board's discretion is not so limitless as to authorize it to mulct an employer and a union by requiring the refund of dues—which the employer never kept and which the union has long since expended to pay for service—upon the basis of nothing but a hostile surmise that the dues would not have been paid but for the union security provision of the agreement.

The question is of manifest importance for, as the General Counsel of the Board has explained, what the Board has done "was to extend the broad reimbursement order, theretofore reserved for Section 8(a)(2) situations, to payments coerced under illegal union security or hiring arrangements with any unions even if not employer-dominated or supported." Address, June 27, 1958, 42 LRRM 101, 102.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

PLATO E. PAPPS
LOUIS P. POULTON
1300 Connecticut Avenue, N. W.
Washington 6, D. C.

BERNARD DUNAU
912 Dupont Circle Building, N. W.
Washington 6, D. C.
Attorneys for Petitioners Local Lodge No. 1424, International Association of Machinists, AFL-CIO, and International Association of Machinists, AFL-CIO

FRANK L. GALLUCCI
Manufacturers National Bank Bldg.
Highland Park 3, Michigan
Attorney for Petitioner Bryan Manufacturing Company

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